))

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 147 of 1997

in

SPECIAL CIVIL APPLICATIONNo 983 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE S.M.SONI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

REGISTRAR

Versus

BJ PATEL

Appearance:

MR J.M.Thakore, Advocate General with
MR S.N.Shelat, Addl. Advocate General with
Mr DA BAMBHANIA for Petitioners
MR Ram Jethmalani, Sr. Advocate with
MR Haroobhai Mehta, Sr. Counsel with MR TS NANAVATI for Respondent.

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE S.M.SONI

Date of decision: 24-28/04/97

ORAL JUDGEMENT (Per J.N.Bhatt, J.)

Could the collective, consensual and coherent managerial wisdom on administrative side of the appellant-High Court of Gujarat, in passing the impugned order of transfer of a judicial officer exercising its constitutional powers under Article 235, be supplanted or implanted by the judicial wisdom, by the High Court, on its judicial side, exercising its constitutional powers of extra ordinary, prerogative, special and equitable writ jurisdiction enshrined in Article 226, that too at an interlocutory stage, in a matter of transfer, is the solitary but the substantial question for our appreciation and adjudication in this Letters Patent Appeal.

Since the main writ petition is awaiting final verdict before the learned single Judge, we would like to mention only the skeleton projection of facts which are relevant and material for the purpose of appreciation and adjudication of the aforesaid dispute raised in this appeal.

The respondent, herein, questioned the legality and validity of an order of transfer recorded by the appellant - High Court of Gujarat - exercising its powers under Article 235, by filing Special Civil Application No.983 of 1997, invoking the powers of Article 226 of the Constitution of India. The transfer order was recorded by the High Court, on 24th January, 1997, whereby, the respondent Judicial Officer, who was working at the relevant time as Chief Judicial Magistrate (CJM) in Baroda district came to be transferred, as Second Joint Civil Judge (SD) and JMFC in the city of Rajkot with immediate effect along with other incidental transfers. By filing the aforesaid petition, the respondent, inter alia, contended that she received the said order on 27th January, 1997 and left the charge of the office of the Chief Judicial Magistrate on the same day within no time so as to join at the transferred station. She, however, has challenged the order of transfer, mainly, on the ground that it was motivated and initiated on account of the representation made by the Commissioner of Police, Baroda, Mr Brar and thereby causing injury to the independence of judiciary. In that, she also alleged that in connection with one criminal case, she had issued notices which were not properly responded by the Commissioner of Police, Baroda, and, therefore, she was

constrained to issue a notice for contempt. It was, therefore, contended that during the aforesaid period when said case was in progress, she received the order of transfer in the middle of the term though the transfers are, normally, effected on or about the period of summer vacation. It was also contended that she will suffer hardship on account of transfer as her children are receiving education and were preparing for examinations and as her husband is also working in Baroda as Joint District Judge in the higher judiciary. It was also contended that the transfer order is not legal as it was not the order of the Full Court as it was only passed by Standing Committee.

It appears from the record and the impugned order of the learned single Judge that the personal grounds were not agitated. The maintainability of the transfer order was raised before the learned single Judge, which was not accepted. The learned single Judge has held that the impugned order of transfer cannot be said to be incompetent or without jurisdiction. It is also held that the order of transfer is not in violation of the provisions of Article 235. However, the learned single Judge has upheld the contention for interlocutory injunction against the implementation of the transfer order during the pendency of the petition, inter-alia, holding that the perception of the Standing Committee which took the decision of transfer was not proper, as a result of which, the interlocutory order staying the execution and the operation of the order of transfer came to be issued on 18th February, 1997. Though request was made to stay the order, it was not accepted as a result of which, the respondent took charge of the office of the Chief Judicial Magistrate, Baroda, without any formality, under the shelter of the interlocutory order granted by the learned single Judge. The manner and mode in which the charge came to be taken by the Chief Judicial Magistrate in the evening of 18th February, 1997, i.e. the same day on which the impugned order came to be passed, alleged to be not only unpleasant and unhappy, but ugly, unusual, shocking and startling to which further reference may be made hereinafter, if required.

The original respondent, High Court of Gujarat, being aggrieved by the said interlocutory order and direction, has, now, come up before this Court by filing this appeal under Clause 15 of the Letters Patent. The appellant, High Court of Gujarat, has assailed the interlocutory order on various grounds.

The learned Additional Advocate General, Mr Shelat, while

appearing for the appellant, High Court of Gujarat, has seriously criticized the passing of the impugned interlocutory order, whereas, the learned Senior Counsel Mr Mehta, while appearing for the respondent-CJM has defended the impugned order with equal vehemence. We have heard the divergent submissions of both the sides at marathon length on different dates and both sides have relied on host of case law to which reference will be made by us at an appropriate stage, hereinafter.

The impugned order of transfer is passed by the appellant, High Court of Gujarat, on its administrative side exercising its constitutional duties and powers under Article 235. Article 235 contemplates complete control of subordinate judiciary by the High Court. It would be, therefore, pertinent to refer to Article 235 at this juncture. It reads as under :

> "235. Control over subordinate courts : - The control over district courts and courts subordinate thereof including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

It could very well be seen from the aforesaid provision that complete control is vested in the High Court on its administrative side. Article 235 of the Constitution of India, undoubtedly, prescribes control over the subordinate judiciary. There is purpose and policy behind it. The constitutional makers have designedly provided provision in Article 235 for complete control over the sub-ordinate judiciary by the High Court so that independence of judiciary doctrine could be very well subserved. The control over the subordinate judiciary by the High Court is exclusive in nature, comprehensive in extent and effective in operation. The High Court is, thus, the sole guardian and custodian as mandated by Article 235. We do not propose to enunciate or indicate that the administrative exercise of powers under Article 235 is beyond the purview of the provisions of Article

226 and 32 of the Constitution of India.

Though, the administrative orders exercising powers under Article 235 are passed, they are subject to judicial review, but the question is of considering the extent thereof. Order under Article 235 is justiciable. But the extent and ambit of justiciability is very much circumscribed. In other words, the judicial review is permissible to an extent, namely, to probe and analyse decision making process itself only and not to examine the merits of the decision. It is a settled proposition of law that what should be the quality, what should be the standard, what should be the nature of order of a management or a master much less the High Court under Article 235, is not within the domain of judicial review. The parameters of judicial review under Article 226 and for that purpose under Article 32 are very much limited and narrow. Therefore, a court dealing with such an administrative order is obliged to address itself to this distinction. The constitutional history, undoubtedly, commands and demands that the parameters and the safeguards envisaged in Article 235 and 226 must be borne in mind while examining the merits of disputes and questions arising out of the orders of administrative nature.

The role of the High Court exercising its power under Article 235 is not only a role of a manager or master, but it is a role of a guardian. It is also a role of a custodian and the position of the High Court vis-a-vis the judicial officers is also like a loco parentis. In order to effectively and efficiently perform its power as well as duties, the High Court on its administrative side is obliged to consider various aspects, various considerations and thereafter has to reach to a conclusion collectively. We may state at this juncture that the High Court acts on its judicial side through Benches. But the decision of any Bench is a decision of the High Court. Likewise, the High Court acts on its administrative side through Committees, but the decision of the Committee is a decision of the High Court. What we try to emphasise is that the decision taken by the Committee is reflecting the collective will and wisdom of the High Court.

The powers of this Court under Article 226 of the Constitution of India are, no doubt, very wide, but are circumscribed in certain parameters and are to be exercised in a limited circumference. Any and every administrative order is not challengeable with the aids of Article 226. Extraordinary, special, prerogative,

plenary, equitable powers of writ court are required to be exercised essentially for the prevention of violation of constitutional provisions or statutory provisions. They are also required to be exercised in the light of the recent developments in the administrative law. Article 226, therefore, can be employed in a given case when illegality is perpetrated or manifest injustice is done in violation of the principles of natural justice. The powers under Article 226 are discretionary. They are circumscribed. When an administrative order is challenged before the Court under the help or aids of the provisions of Article 226, what is required to be shown is that the person, management or the authority or decision making institution has taken the decision which is vitiated either because of non-observance of principles of natural justice or in violation of the principles of law or on the ground of proved strong case of malafides. It is not designed to substitute the just and meritorious administrative orders or decisions. It is not devised to supplant the managerial action or discretion. What is designed is to see as to whether the "decision making process" is just proper and legal and without any contamination. If the decision making process is found to be free from any vice or quite fair or quite reasonable, it is not for the High Court to question the nature of the decision, the type of the action and the quality of the action. Otherwise, the role of the Court under Article 226 would not be supervisory but it would become a role of an appellate Court.

It is a settled proposition of law that the role of the Court while exercising its power under Article 226 is not that of an appellate Court. It is not what is decided to be seen. It is 'how' decided, that is to be seen. If 'how' says free, fair, just, reasonable, then 'what' become immaterial. The Court cannot substitute the managerial decision or administrative wisdom. These parameters must be borne in mind by us. It is, therefore, rightly said that the powers of the Court under Article 226, though very very wide, are circumscribed to an extent in selected spheres and fields.

It may further be noted that the role of a Court under Article 226 is still narrower in case of a challenge against the order of the Management arising out of service jurisprudence. The recent trends and the recent developments in the administrative law, undoubtedly, go to show that transfer is a concomitance of service. It is an inherent incident of service. It cannot be

objected ordinarily. When it could be objected is also highlighted in catena of judicial pronouncements. So, limited role assigned to a Court in a writ jurisdiction is still narrower in a challenge of an order of transfer.

What is required to be seen by the Court when a question is raised with the help of Article 226 against the order of transfer which is passed by the Management, much less collective decision of the High Court, is as to whether any vice like malafide, violation of principle of law has tainted the decision of the authority. If the answer is 'no', the matter ends. Who should be posted, where should be posted, how should be posted, why should be posted are some of the questions, absolutely, falling exclusively within the domain of the management and the master. Of course, the orders are required to be passed on public ground, on the ground of administrative exigencies, and if the orders of transfer are recorded on these grounds, which are unquestionable and without any contamination, they cannot be challenged much less with the aid of extraordinary, equitable, prerogative powers under Article 226 of the Constitution of India.

Article 226 of the Constitution reads as under :

"226. Power of High Courts to issue certain writs -- (1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority , including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in

any other manner, is made on, or in any proceedings relating to, a petition under clause (1) without

(a) furnishing to such party copies of such petition and all documents in support of the plea of such interim order; and

(b) giving such party an opportunity of being heard;

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32."

What we try to highlight is that the extent and the ambit of writ jurisdiction in a case of challenge against the order of transfer is very much circumscribed. Again, we may say that it is very very circumscribed i.e. it is the narrowest, at an interlocutory stage. Ordinarily, the decision recorded by the Management or the order passed by the administration, apparently, is without any tint of illegality or malafide cannot be successfully stayed or stopped. What we have to deal with here is an order of transfer recorded by the High Court on its administrative side exercising its ex-ordinary constitutional powers under Article 235 which came to be stopped and intercepted, enroute, at the interlocutory stage substituting it by a judicial order in place of the collective wisdom of this Court on the administrative side. Could it be said to be legal and valid ?

The administrative law is developing very fast. So is the case of fast developments in service jurisprudence. Ordinarily, it is for the master or the management to

decide the administrative problems and take appropriate administrative decisions. Whereas, in the present case, the administrative decision of a transfer is taken by the constitutional authority exercising its constitutional powers under Article 235 and that too after collective, consensual, careful analysis and assessment of the factual reality that prevailed in courts, at Baroda, at the relevant time.

Before we discuss the merits of the rival submissions raised before us so vehemently, we would like to highlight certain facts and aspects which are very relevant and very material for the purpose of the question in focus before us which have remained unimpeachable.

(1) The impugned order of transfer recorded on 24th January, 1997, by this Court on its administrative side on its plain perusal is simpliciter passed on administrative ground.

(2) It does not, prima-facie, appear to be in any way stigmatized or in any way punitive as well. It is purely, prima facie, passed on public ground.

(3) The respondent-CJM is belonging to higher judiciary of Gujarat. She had been working before the impugned order of transfer came to be recorded at the same place of Baroda for more than three and a half years along with her spouse who is also in the higher judicial service as Joint District Judge.

(4) There is no dispute about the fact that, ordinarily, a transfer takes place at the end of three years. Respondent continued along with her husband at Baroda upon her request for more than 3 years.

(5) The respondent, no doubt, left the charge immediately on receipt of order of transfer on 27th January, 1997, but did not report to the transferred station.

(6) She made an oral representation against the order of transfer before the Registrar on the same day and also written representation to the Hon'ble Acting Chief Justice of this Court on 29th January, 1997 and immediately on the next day, i.e. on 30th January, 1997, she filed Special Civil Application No.983/97, challenging the

order of transfer on the judicial side invoking the powers of Article 226 even without waiting for a reply for a day.

(7) She did not report to the transferred station and instead took charge of the office of CJM, Baroda under the shelter of judicial order that was passed on 18th February, 1997 in a manner and mode which is alleged to be unpleasant, unusual, ugly and objectionable, prima facie, cannot be ruled out.

(8) The transfer order is passed on collective decision of the High Court which is founded upon the report of the learned unit Judge of this Court who has been in charge of the Baroda unit. It was initiated by the learned Senior District Judge of Baroda against whom there is no even whisper of malafide or any allegation.

(9) There is no dispute about the fact that the representation filed by the respondent against transfer has not been disposed of. It appears from the record that leave is also not sanctioned. Therefore, though she left the charge on 27th January, 1997, without getting the leave sanctioned, without reporting at the transferred station, took over the office of Chief Judicial Magistrate under the shelter of the interlocutory order dated 18th February, 1997 in a manner which is, prima facie, noticed tobe objectionable.

(10) There is no even allegation of malafides or bias or arbitrariness in the main petition.

(11) Equally true is the fact that there is no allegation of breach of provisions of law or any rule.

(12) Transfer is prima facie made on the administrative exigencies in absence of any malafide and breach of provisions of law or rule.

(13) Transfer is on the equivalent post after 3-1/2 years period. Transfer is normally done at every 3 years of service at one station.

(14) Impugned order ex-facie does not show that celebrated 3 principles of law i.e. (1) prima facie case (2) balance of convenience and (3)

irreparable injury, were considered as such.

(15) The approach and attitude of any person much less a responsible Commissioner of Police in not obeying and complying the order of the court is alleged to be also objectionable and contemptuous. But the merits of the allegation in this behalf by respondent against the Commissioner of Police cannot be examined in absence of Commissioner being a party who though initially was impleaded as a party respondent in the petition came to be deleted.

(16) It be mentioned that respondent deleted the Commissioner of Police as a party from the record for the reasons not made known to us. There is also no any allegation against him.

(17) The Commissioner of Police, inter alia, contended in the representation that after FIR having been lodged with the particular police station, the magistrate has no jurisdiction to transfer the investigation or to interfere with the ongoing investigation in cognizable offences as per the provisions of law and settled proposition of law and he being the public officer, like any other litigant was entitled to the correctness and legality of the judicial orders passed exparte. He had, therefore, taken legal actions by filing 5 revision petitions in the Sessions Court against certain orders of respondent-CJM. It was, therefore, stated by him that the learned CJM (respondent) was out to somehow lower the prestige and position of the office of C.P. by making him appear in the court of CJM. It was also contended that in trivial matters, he was required to appear "in-person" though he was not at all involved. It is also stated in the representation that as many as five revisions were filed and they were pending when again contempt notice was issued. It was in this context, the High Court was requested to consider the prejudicial approach of the CJM.

(18) The letter dated 10.1.97 of CJM to CP asking C.P. to appear before the court personally on 13.1.97 and to explain why action should not be taken against him for disrespect of the court and failure to do so ex-parte criminal contempt action shall be initiated which letter was challenged by CP by filing Revision before

Sessions Court, at Baroda and the letter is stayed by the Sessions Court. Despite that, Commissioner of Police, Vadodara, has tendered unqualified apology before this Court in M.C.A. No.249/97 and also before the Trial Court i.e. Chief Judicial Magistrate's court in person on 13.2.97, for the alleged action in the said letter.

(19) The view and perception adopted in the impugned order is based purely on presumption and assumption without supporting material at the interlocutory stage before the High Court could file its reply or affidavit.

(20) There is no prima facie case for passing interlocutory order staying order of transfer and permitting respondent Judicial Officer to resume the office of Chief Judicial Magistrate. One Mr Khokhar was appointed as CJM, at Vadodara, and he had taken over the charge. Under the impugned interim mandatory order, respondent again took over charge of office of CJM, prima facie, without observing required procedural formalities. Therefore, appellant High Court has, seriously, objected the manner and mode in which the respondent resumed the office of Chief Judicial Magistrate.

(21) There was no fit and appropriate case for passing interlocutory order in mandatory form.

(22) Area and ambit of justiciability in case of an order of transfer, at interlocutory stage, is the narrowest under Article 226 and more so when High Court passed impugned order of transfer exercising its constitutional powers under Article 235 in its administrative collective domain and that too without any allegation and iota of malafides and bias.

(23) Judicial service is not a service in the sense of 'employment'. The judges are not employees. As member of judiciary, they exercise the sovereign judicial power of the 'state'. They are holders of public office in the same way as members of Council of Ministers and members of Legislature. This view is very much enunciated by the Apex Court in two decisions of All India Judges Cases.

The District Judge, Baroda, reported to the High Court who felt that in view of the pendency of the criminal proceedings in the court of the respondent-CJM and exchange of letters and alleged non-observance of the order passed by the Chief Judicial Magistrate by the Commissioner of Police, Baroda, Mr Brar, there was unseemly, undesirable situation requiring immediate attention and action. The oral report of the District Judge shows the urgency of passing orders so as to obviate undesirable situation. It appears that the learned Judge of this Court in charge of the Unit had discussion with the District Judge and after having conferred with the District Judge and considering the information from other sources, he felt that in view of the unseemly controversy between the office of the Commissioner of Police, Vadodara City and the Chief Judicial Magistrate and also considering the entire matter being published in the Press daily, he was pleased to suggest three modes for solving the problem.

(i) to transfer the Chief Judicial Magistrate, Vadodara immediately.

(ii) to change the assignment of business assigned to her immediately, or

(iii) any other suitable action.

This was reported by the learned Unit Judge to the Hon'ble Acting Chief Justice.

The Hon'ble the Acting Chief Justice considered the report of the unit Judge. The report of the unit Judge was based on the oral report of the District Judge as well as the information gathered from different sources.

The Standing Committee of the High Court which is consisted of seven senior Judges examined, considered, appreciated and in its unanimous collective wisdom thought it fit to pass the impugned order of transfer against the respondent-CJM on 22nd January, 1997, whereby, transferring her from her place of CJM, at Baroda, to the office of Second Joint Civil Judge (SD) and JMFC at Rajkot. This is highlighted to show that unlike other usual cases of master and servant relation, this is a case where the decision on the administrative side of this Court under Article 235 was taken after careful consideration, after dispassionate dialogue and after getting it approved through the inbuilt mechanism and machinery of the administration of the High Court. It is a decision of the High Court as such.

This decision of the High Court which represents the collective will and wisdom of the High Court is questioned by filing writ petition invoking the powers under Article 226 of the Constitution without any slightest allegation of malafides, bias or any prejudice. The main ground which is agitated in the petition is that the impugned transfer order is tainted and prompted by the representation made by the Commissioner of Police. The allegation is that the question which was processed through the procedural conduit pipe by learned senior Judges of this Court stands vitiated on the ground that it imperilled the independence of the judiciary, which is, prima facie, at the interlocutory stage, found favour, in the impugned order which is challenged before us.

The learned Additional Advocate General has, seriously, criticized the impugned order and in support of his contention, he has also contended that the administrative wisdom cannot be substituted by the judicial decision and that too at the interlocutory stage without entering into full-fledged inquiry of the dispute. He has drawn our attention to the observations of the learned single Judge made, in para 13, of the impugned order which read as under :

> "I do agree with the contention that this Court cannot substitute its wisdom, but here is a case in which I find that the perception, that a situation like in N.L.Patel's case was likely to be repeated, had no basis and merely because some judicial orders had been passed by the petitioner in the matters, which were pending before her and merely because in certain cases the orders passed with regard to the transfer of investigation from one Branch to another Branch were not liked by the Commissioner of Police, it would not be perceived that incident like Mr.N.L.Patel was likely to be repeated."

We are extremely unable to disagree with what Mr Shelat has submitted. The aforesaid observations and the order impugned, unequivocally, radiate an imprint of substitution of judicial order in place of an administrative order recorded by the appellant High Court exercising its constitutional power under Article 235 and that too without any allegation of malafides or any allegation of breach of the provisions of rules or law much less strong proven malafides. The impugned order of

the learned single Judge states that the correct perception is not reached by the Standing Committee and therefore in passing an order of transfer, it has endangered the independence of judiciary. As observed hereinbefore, which we also highlight further hereinafter by catena of decisions that the substitution of administrative order without any tint of illegality, malafides, unfairness, arbitrariness, cannot be allowed being impermissible. The court exercising its power under Article 226 is not an appellate authority.

Though the learned single Judge agrees that the substitution of order cannot be done by the Court on the judicial side, while agreeing with the contention that this Court cannot substitute its wisdom, it came to be supplanted for the simple reason that the perception taken by the Management or the Standing Committee of the High Court is not correct, which is not sustainable.

We may point out here that the concept of exercise of discretionary power is though complex, but, undoubtedly, says that it involves variety of alternatives, it covers different types of options and approaches. The very expression "discretion" connotes more than one action, more than one alternative. The perception of situational reality arising out of the record and the facts made by the Standing Committee based on the report of the learned Unit Judge supported by the oral report of the Senior District Judge could be, prima facie, said to be erroneous that too at an interlocutory stage and on what basis?

Be that as it may. Even if a different view is taken, then also, it is not permissible for the Court on the judicial side to supplant it by its wisdom. This is the gist and genesis of the administrative law. If decision making process is vitiated, the judicial order must enter into it. In a case of discretion, if more than one perception or more than one alternative can be considered and can be reached and if not reached the same and one as taken in impugned order would warrant exercise of extra ordinary powers under Article 226? Perception may be different. It depends upon the appreciation, depends upon the assessment, depends upon the evaluation and the analysis of the situation and if the Standing Committee consisted of seven learned senior Judges of this Court after having analysed the factual situation based on the first hand account made by the Learned Unit Judge in charge of the Unit of the Baroda, supported by oral report of the Senior District Judge, could be said to be unobtainable, impermissible, incorrect and that too at an

interlocutory stage? In our opinion, the approach of the learned single Judge in justifying the substitution of judicial order in place of the administrative order of transfer is, with due respect with utmost command within us, not sustainable. We have not been able to persuade ourselves to agree that the view taken by the learned single Judge in passing the impugned order is acceptable.

It may also be noted at this stage that the parameters for the grant of interlocutory order, though are not prescribed in the Constitution, but are analogous to the provisions of Order 39 Rule 1 and 2 of the Code of Civil Procedure 1908 (Code). The impugned order suggests only that the respondent- original petitioner has a fair case. Could mere existence of fair case is enough for attracting interlocutory order ? The spontaneous answer would be in the negative. It is a settled proposition of law that interim order during the pendency of the main dispute can be granted provided the following ingredients are established to the hilt:

(1) Prima facie case;

(2) Balance of convenience; and

(3) Irreparable injury.

Mere existence of one of the factors is not sufficient. Even the impugned order does not remotely say that balance of convenience tilts in favour of the respondent or that refusal of the interlocutory order will result into irreparable harm and damage. All the three principles governing the grant or refusal of the interlocutory injunction or order must co exist. It is not enough even strong prima facie case is shown. It must be, successfully, shown that there is strong prima facie case and irreparable harm will be caused to the petitioner if the interlocutory order is refused and balance of convenience tilts in favour of the petitioner. It is rightly submitted that the impugned order on its plain perusal does not say that there was any prima facie case or that balance of convenience tilted in favour of the respondent-original-petitioner or that irreparable injury will be caused in case of refusal of the interim relief or order.

In host of cases, it has been extensively explored and enunciated as to what points and parameters, the Court is required to bear in mind while passing the interlocutory order or injunction and whether irreparable or serious mischief will be caused to the petitioner, whether

refusal of interim relief or interlocutory injunction would involve greater hardship or injustice than the grant of it would involve. The Court should also consider at that time whether hearing the whole matter would suffice. The general principle and parameters for the grant of interlocutory injunction are required to be considered and must be reflected in the order because the interlocutory order is based on the premise that allegation made is correct. Therefore, time and again Courts have said that all the three aforesaid principles must be examined and must have co-existed before interlocutory order is recorded in favour of a party. Unfortunately, with highest respect within our command, we do not find any such discussions in the impugned order. We are constrained to say that the perception reached for the grant of interlocutory order by the learned single Judge is only inferential if not speculative. Therefore, we have not been able to convince ourselves to agree with the view taken and the perception adopted.

The contention is raised by the learned Senior Counsel Mr Mehta that Letters Patent Appeal against the interlocutory order is incompetent. This half-hearted submission is whole heartedly opposed by the learned Additional Advocate General. We may state that Letters Patent Appeal lies in view of the provisions incorporated in Letters Patent. We may also, incidentally, mention that there is a historical interesting background of the concept of Letters patent, but we do not deem it necessary to divulge ourselves on that aspect at this stage. But the purpose and policy incorporated in clause 15 of the LP is unequivocal.

In case of any judgment, the letters patent appeal could be resorted to invoking clause 15. No doubt , the expression 'judgment' is not statutorily defined or articulated, but 'judgment' means order or decision permanent or temporary. when rendered on the merits of the matter and which affects also the merits. So it is not the type of judgment, but the resultant effect of that order which must enter into consideration. It would be profitable to refer to clause 15 of the Letters Patent which reads as under :

> "15. Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction -- And We do further ordain that an appeal shall lie to the said High Court of Judicature at Madras, Bombay, Fort Wlliam in Bengal from the judgment not being a judgment

> passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, made on or after the first day of February 1929 in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided."

The proposition advanced by the learned senior Counsel Mr Mehta that LPA against the interlocutory order of a single Judge is not maintainable is running counter to the ratio of the decision of this Court rendered in Civil Application No.2207 of 1995 in Letters Patent Appeal No.893 of 1995 in the Secretary, Revenue Department vs. Shri Varsanbhai Rajubhai Rathwa & ors. decided on 16th September, 1995. A Division Bench (Coram: R.A.Mehta, Actg. CJ and S.K.Keshote, J.) have enunciated and expounded as to what is the expression 'judgment' incorporated in clause 15 of the LP relying on a decision of the Calcutta High Court and also of the Apex Court.

Similar contention raised before this Court in that case was negatived and it was held that interlocutory order of this nature is falling within the parameter and purview of clause 15 of the Letters Patent and therefore the appeal is competent and maintainable. Reliance was placed on the decision of the Apex Court in the case of Shantikumar v. The House Insurance Co. of New York, AIR

1974 SC 1719. The observations made in para 19 in the said decision of the Hon'ble Apex Court are pertinent. They are as follows:

> "In finding out whether the order is a judgment within the meaning of clause 15 of the Letters Patent it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The right or liability is to be found out by the court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability."

The Apex Court has while enunciating the ratio in relation to the expression 'judgment' had approved the decision of the Calcutta High Court in the case of Justice For Peace for Calcutta v. Oriental Gas Co. The observations made by the Hon'ble Calcutta High Court in para 10 are very material which reads as under :

> "We think that 'judgment' means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit , and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

In the said decision before this Court, an interim order came to be passed in case of a dispute of seniority list and by virtue of the interim order, the learned single Judge had held that the petitioners were entitled to the relief against reversion. That interim order was questioned in Letters patent Appeal and in that submission was raised that the interim order or interlocutory order is not a judgment and therefore appeal is not maintainable in view of clause 15 which was rightly rejected and endorsed the view taken by this Court in the earlier decision relying on the decision of the Supreme Court. With the result, the submission whereby a legal missile sought to be launched against the present appeal is frustrated and the submission is required to be rejected. Accordingly, we reject it.

CASE LAW:

Both the sides have placed reliance on various decisions

in support of their rival contentions. Therefore, we propose to deal with and discuss the principles of law and case law relied on by the parties. We have, dispassionately, examined the decisions relied on by the parties. Most of the decisions are relating to the principles regarding interim orders and the interpretations of the provisions of Article 226 and 235 of the Constitution of India and some of them are highlighted here as under.

(1) The scope and jurisdictional sweep, no doubt, of Article 226 is very much circumscribed;

(i) Judicial review under it cannot be converted into an appeal;

(ii) It is confined to examining procedural correctness;

(iii) It does not extend to going into merits of dispute or controversy.

(2) Judicial review is not directed against the decision, but is confined to the examination and appreciation of the decision making process;

(3) Resort to it has been provided, inter-alia, for protection and enforcement of rights. It is a discretionary relief which cannot be granted as a matter of right and it could be also refused if there is conflicting interest of an individual with that of the public interest. In other words, public interest is of paramount consideration.

(4) It must also be remembered that the Court would always expect utmost faith and equity on the part of the party applying for the discretionary and equitable relief under Article 226.

(5) It could be granted if the Court is satisfied about the existence of (i) prima facie case, (ii) balance of convenience and (iii) irreparable injury. All the three ingredients must co-exist.

(6) It is also necessary to consider whether the decision making process is faulterable or objectionable and whether the fault is such which would vitiate the making of decision itself.

(7) Justiciability and control of discretionary power

depends upon variable, divergent and different situational reality and type of factual scenario.

(8) Justiciable issue has been described in general terms as simply one which raises real and substantial questions in a form appropriate for judicial determination.

(9) It is true an administrative law which is as such in the form of judicial review of an executive action is stripped of its outdated technicalities and artificial distinction.

(10) The critical question is whether the intervention of the court is desirable or appropriate and nowhere is the answer more frequently difficult to find than in the control of discretionary power.

(11) It is also necessary to consider that the control of discretionary power is arising out of which source :

(i) Is it the discretionary exercise out of non-statutory power ?

(ii) Is it out of statutory powers ?

(iii) Is it out of Constitutional powers ?

(12) The exercise of power is made by whom and how ?

(13) The principles of judicial review may be employed and exercised considering whether exercise of discretionary power is not bonafide, whether it is unreasonable ? Whether there is abuse or misuse of such power ?

(14) Variability, of course, is the outstanding feature of judicial review of administrative action.

(15) Innumerable factors influence the courts in the judicial surveillance of discretionary powers and there is as much variability in the application of well known principles as in other areas of facets of the scope of review.

(16) It is for the administration to decide and determine which criteria, which factor, which perception must receive weight out of many

alternatives in bonafide exercise of discretionary power and not the courts.

(17) It is not for the adjudicator to supplant or implant, supply or simply modify or nullify, fester or foster, simplify or nullify bonafide exercise of administrative discretionary power and more so when it is prerogative or constitutional.

(18) Judicial review process is permissible only in decision making process and not the type, nature, quality, and standard of decision or action .

(19) Vulnerability of courts intervention when discretion is bonafide exercised in certain orders or decisions on administrative side more so when judicial technique and policy contents or internal managerial wisdom is used or employed bonafide.

(20) The reasons for decision maker taking one course rather than another do not normally involve question to which if disputed judicial process is adopted to provide right answer.

(21) The subject matter of judicial review in reality encompass virtually the entire machinery of executive-administrative mechanism.

(22) Justiciability is inevitably bound up with issues of judicial restraints, judicial techniques and judicial discipline and judicial propriety.

It becomes, therefore, clear from the aforesaid settled proposition of law that the standard, extent, quality and like aspects are not to be examined like an appellate court or superior authority.

It is true that the action or an order on the administrative side is thus justiciable but the arena or area of justiciability must engage the attention of the Court as it is very much circumscribed unlike in a case of an appeal. Even such a limitation is much more in a case of service matter and extremely narrower in a case of transfer and the narrowest at an interlocutory stage. Before granting mandatory interlocutory injunction, the Court must also address itself to the following questions:

(1) Firstly the Court must feel a high degree of assurance that even after the full-fledged trial similar order in all probabilities be granted; and

(2) Secondly, that irretrievable harm and injury shall be caused if the thing complained of is allowed to continue until final decision in the matter.

Learned Additional Advocate General has pointed out that before passing the impugned order, which is an interim mandatory order in nature, the Court has not considered the three celebrated principles and also the aforesaid two important aspects. We have not been able to find from the impugned order that the aforesaid aspects were very much in consideration before passing of the impugned order.

It may also be mentioned that the administrative action is a comprehensive term and defies the exact definition. Speaking generally, that an administrative case can be classified into four categories, i.e. (1) rule making action, (2) rule-decision action, (3) rule application action and (4) ministerial action. Administrative action itself is residuary and it is neither legislative nor judicial. It has no procedural obligation of collecting evidence and weighing arguments. It cannot be gainsaid that such an action on many occasions is based on subjective satisfaction rather than the decision is based on policy and expediency. It does not decide the right though it may affect the right. It is, therefore, a settled proposition of law that writ court under Article 226 cannot probe into the expediency of the decision.

In the present case, the impugned transfer order is an administrative one on its exercise by the High Court invoking the provisions of Article 235. The perception which is conceived in the impugned order cannot be said to be the only one and final view in the light of the attendant facts. At the best, it may be one of the alternatives. It may be one of the perceptions which decision making authority could have taken. That by itself, however, is not sufficient to invoke the powers of Article 226 and substitute the administrative decision with one judicial order. What is required to be considered is whether the final outcome or the decision rendered by the authority is in any way tainted by extraneous consideration or the decision is unauthorized or it is contaminated with malafides or suffers from the vice of principles of natural justice or the like

aspects.

Administrative discretion in common parlance means choosing from amongst the various available options, perceptions or alternatives without reference to any pre-determined criteria, no matter how subjective that choice or the perception it may be. The problem of administrative discretion is, no doubt, complex. There has been constant conflict between the claims of the administration to an absolute discretion and claims of subject to a reasonable exercise thereof.

Notwithstanding that, the powers enshrined under Article 226 do not empower the writ Court to supplant the administrative decision merely on the hypothesis or on the basis that a different view could have been taken. The authority concerned is obliged to take into account various aspects and circumstances and has to reach a decision which is precisely, prima facie, done in the present case. The administrative order, therefore, cannot be interfered with unless :

(i) it is vitiated by proved malafides or

(ii) it is found in violation of rule provision or statutory provision; or

(iii) it is the outcome of an unauthorised act; or

(iv) it is without observance of principles of natural justice wherever it is required.

The judicial review of transfer of a member of a transferable job or a service itself is exceptionable. It can be made, therefore, by the Management or the Master as a matter of course. It could, thus, be very well visualized that the jurisdictional sweep in a role of the Court in a service matter more so in a case of transfer is very much narrowed down and that too on limited grounds and on circumscribed zone and limited parameters. Interference with such an order of the Management and more so at the interlocutory stage is exceptional and rarest of rare as it is in the narrowest compass. As we have seen from the factual scenario emerging from the record of the present case that the perception and the view which prompted the learned single Judge to stay the order of transfer even in a mandatory form at an interlocutory stage cannot be said to be the only perception or that the perception of the management in the present case, prima facie, cannot be said to be unreal or unobtainable.

The High Court on its administrative side cannot be said to have reached to an unauthorised or illegal conclusion requiring interference exercising extra ordinary powers under Article 226 of the Constitution of India at an interlocutory stage. We feel that the learned single Judge reached to a conclusion on certain premises and surmises and that too without having the benefit of the affidavit version of the other side i.e. High Court on administrative side. It is noticed from the record that the impugned order is passed mainly considering the averments in the petition at the interlocutory stage and in absence of the affidavit in reply of the High Court on its administrative side. It is true that the impugned order came to be passed after hearing both the sides. However, it is equally true that the arguments were offered on the question of issuance of rule and the interim relief simultaneously. Therefore, affidavit in reply was not filed, whereas, now (in the civil application) before us, an affidavit is filed on behalf of the High Court and the averments made in the affidavit filed by the respondent in the main petition are traversed and controverted. In the affidavit, the High Court has, clearly, controverted the allegation that the impugned decision of transfer was the outcome of only due to the representation made by the Commissioner of Police, Vadodara. Having once denied such an allegation by the High Court, there is nothing on record which should prompt us or to even remotely suggest that the said averment in the affidavit is untrue and unacceptable at this stage.

The allegation made by the respondent is traversed. Therefore, in our opinion, there was not even prima facie case so as to consider whether interim relief should be granted or not. A fair case or a prima facie case at times may be taken sufficient for issuance of process or issuance of notice. But merely because there is a "fair case", merely even if there is prima facie case, ipso-facto would not be sufficient to grant interlocutory order and that too in a mandatory nature without adverting to the principles of balance of convenience and irreparable injury.

It has been contended that passing of the impugned order by the High Court on its administrative side exercising its constitutional powers under Article 235 transferring the respondent from Baroda to Rajkot on the equivalent post has endangered the independence of the judiciary. The learned single Judge has also observed in the impugned order that it was a case in which the question

relating to independence of judiciary is involved. It is thereafter observed that the petitioner has a fair question to raise and the matter requires more detailed consideration. Our attention is invited to the observations made in para 13 of the impugned order under appeal and it has been contended that taking one view in the matter exercising administrative power under Article 235 for the public interest and for the administrative exigencies there would never be a question of sacrificing the independence of judiciary. We find much force and substance in this contention.

It was alleged that respondent-CJM was prejudicially acting and such orders were highlighted in Press which could have been avoided. We may also mention that independence of judiciary, undoubtedly, is an important pillar of the rule of law which is one of the basic features of the Constitution. The independence of judiciary in a democratic set up for the maintenance and sustenance of rule of law is very important. Primary basis of judicial independence is to see that a judge is free from executive or any other sources. The freeness and fairness of a judicial decision should not be tainted or contaminated by any pressure from any authority even by the section of the Bar or any other authority or institution. Founding fathers of the Constitution have, designedly, even provided complete independence of administrative jurisdiction under Article 235. Complete control and exercise of powers under Article 235 is also an integral part of the doctrine of independence of judiciary. No doubt, we would hasten to add that the concept of control over the subordinate judiciary under Article 235 is not immune from the scrutiny under Article 226. But the parameters of justiciability are very much circumscribed as we have noted hereinbefore.

Independency of judiciary is a basic feature of our Constitution and there cannot be any question about it. One of the methods of safeguarding of independence of judges and judiciary is vesting of full control in the High Court over the subordinate judiciary. No doubt, it is not an absolute one like brooding omnipresence. At the same time, one should not idolize it so as to become counter productive. In fact, one of the important principles of independence of judiciary is broad accountability of a Judge also. It is rightly said, Judges should be stern and tough unbending to power, economic or political and they must uphold core principle of the rule of law which say that "Be you ever so high, the law is above you".

It, clearly, connotes that a judge in dispensation of justice and in discharge of his duties should act and behave in such a way that his decisions are independent and free from bias or pressure from any quarter much less a section of the Bar. The type of work of a judge is such that in discharge of his judicial duties, he has to be free from any pressure, any influence, any consideration even from the higher ups of the hierarchical set up of the judicial system. Judge should not fraternise or patronise with Bar. Judge should also avoid press publicity. Least known judge is the best Judge.

A judge in order to uphold the independence and integrity of the judicial system and the institutional image must avoid impropriety in all his activities, much less in discharge of his judicial functions. Powers that may be with him has to be regulated so as to avoid any conflict with the judicial duties and a judge must behave like a judge. Not only that he should act like a judge, but there must be an impression that he acts like a judge. It is not only that he is acting independently and without any pressure, but it must seem to have been done so. A judge must not have favourites. A judge must not have bias. He should not act under pressure or any influence even from any section of the Bar. A judge should entertain the dispute without any bias or prejudice. He should not allow the litigants and the officers to carry an impression that that there is biased or prejudiced action or order. If such an attitude showing bias or creating impression that prejudicial order is equally fatal for the independency of judiciary. No doubt, what the judge is exercising is not the power of the judge, but is exercising the power of the institution of a judge. In other words, no judge has an individual power. It is power of the institution and therefore, a judge is obliged to behave and act which upholds and enhances the majesty and dignity and decorum of the institution.

We do not propose to divulge in details into the pathology and prognosis of service jurisprudence. We, however, can't resist the temptation of making a reference of what Benzamin Cardozo said (in the factual backdrop which led to the filing of writ petition).

> "The Judge, even when he is free is still not wholly free. He is not a knight errant roaming at will in pursuit of his own ideal beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to

> spasmodic sentiment to vague and unregulated benevolence. He is to exercise a discretion, informed by tradition, methodised by analogy, disciplined by system, and subordinated to the primordial necessity or order in the social life wide enough in all conscience is the field of discretion that remains".

As we have already observed hereinbefore, there is no material to substantiate the allegation that the impugned order of transfer was prompted on account of the representation of the Commissioner of Police (CP for short) at the interlocutory stage. Therefore, the perception reached to in the impugned order under appeal even if it is possible, ipso-facto, would not be sufficient to warrant interlocutory order at that stage and that too in a mandatory form. That the order of transfer recorded by the High Court on its administrative side exercising constitutional power under Article 235 is not unauthorised or is not tainted with illegality, even which does not seem to be the case of the petitioner, in absence of any remote suggestion of malafide, much less proved malafides, how could we hold at the interlocutory stage that the order of transfer which is the outcome of considered opinion of a Senior District Judge and prima facie balanced objective assessment of the situation recorded by the learned Unit Judge of this Court and consideration by the Standing Committee of the High Court and taking unanimous decision as unauthorised or illegal?

The view and the perception reached by the High Court placing the issue in focus and after undergoing extensive exercise and thereafter passing the order invoking the constitutional powers of Article 235 could not have been said to be unauthorized or illegal more so in case of absence of malafides or in absence of allegation of breach of rules and that too holding that it has endangered the independency of judiciary? We have not been able to approve the view and perception taken in the impugned order under appeal. There is no misuse or abuse of power. There is no bias nor arbitrariness. Impugned transfer order prima facie appears to be balanced. At any rate, it can not be said to be unauthorized. Therefore, reliance by learned counsel Mr. Mehta on a decision of Apex Court in Smt. S.R.Venkatraman v. Union of India, AIR 1979 SC, 49, is of no any assistance to the respondent-CJM.

The principles governing the grant or refusal of

interlocutory or interim relief in a petition under Article 226 challenging the order of transfer are very well settled. They are laid in catena of judicial pronouncements. It may also be mentioned that the respondent-Judicial Officer had made a representation and without even waiting for the reply, on the very next day after making representation straightway invoked the extraordinary remedy under Article 226 of the Constitution. Ordinarily, when the representation is made and dispute is under the examination and consideration of the Management or administration, writ court would not be inclined to entertain the petition. This proposition of law is also explained and expounded in the case of Shanti Kumari vs. Regional Deputy Director, Health Service, Patna, AIR 1981 SC 1577.

Therein, it is clearly held that in case of transfer of an auxiliary nurse-Mid wife which was under challenge, that transfer of a Government servant may be due to exigencies of service or due to administrative reason, the court cannot interfere in such matters. The transfer was alleged to be in contravention of State Government's direction. Considering this allegation, it was held that guidelines issued by the Government do not confer upon the employee any legally enforceable rights and therefore, the order of transfer made without following the guidelines cannot be interfered with. If there is breach of guidelines, representation could be made to the authorities who will look into the matter and redress the grievance of the aggrieved employee. It is also clearly held by the Apex Court that when the transfer is challenged on the ground of contravention of the guidelines of the State Government and that too without filing a representation to the State Government, the High Court rightly declined to interfere and the decision of the High Court was, thus, upheld.

Learned Senior Counsel Mr Mehta has placed strong reliance on a decision of the Apex Court rendered in R.C.Sood vs. High Court of Rajasthan, 1994 Supp. (3) SCC 711. In the light of the facts in that case, the order of the High Court under Article 235 came to be quashed as it was found that it was not an authorised order being unfair and arbitrary. The ratio propounded in the said decision is, obviously, not attracted to the facts of the present case. The question of consideration of principles of natural justice in case of order of transfer does not arise at all. Consequently, the learned Senior Counsel Mr Mehta has been unable to make any capital out of the said decision.

Next, reliance is placed by Mr Mehta on the decision of the Apex Court in C.Ravichandran Iyer vs. Justice A.M.Bhattarcharjee, (1995) 5 SCC 457. Our attention was drawn to para 10 of the said decision. Principle is succinctly laid down that rule of law and judicial review are basic features of the Constitution. As its integral constitutional structure, independence of the judiciary is an essential attribute of rule of law. Judicial review is one of the most potent weapons in the armoury of law. The judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. It is, therefore, absolutely, essential that the judiciary must be free from the executive pressure or influence which has been secured by making elaborate provisions in the Constitution with details. It is further held that the independence of judiciary is not limited only to the independence from the executive pressure or influence; it is a wider concept which takes within its sweep independence from any other pressure and prejudices. It has many dimensions, viz. fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong. Reliance is also placed on the following observations made in para 21 of the judgment :

"Judicial office is essentially a public trust.
Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself. It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and

> probity. The standard of conduct is higher than that expected of a layman and also higher than that expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society."

Relying on the aforesaid observations made by the Apex Court, it has been contended that the administrative action of the High Court should be free from any bias and influence. It is, therefore, submitted that the members of the sub-ordinate judiciary should not be visited with unfair and arbitrary administrative orders while exercising administrative powers under Article 235. The principles laid down in the aforesaid decision are unquestionable. In passing the administrative order, individual Judge must feel secured in view of the social demand for active judicial role which he is required to fulfil. In our opinion, the principles laid down in the said case, undoubtedly, go to show that a Judge should maintain high standard of conduct both in public and private life based on high traditions. The question before us is whether the independence of judiciary is in any way jeopardized or endangered in passing the impugned order of transfer against the respondent in exercise of its constitutional powers under Article 235? As observed hereinbefore by us, there is no any material justifying such a conclusion.

On the contrary, after having examined the principles laid down by the Apex Court in the case of Ravichandran Iyer (supra), it can safely be stated that in case even a feeling is created rightly or wrongly that there is failure to act judicially or impropriety in exercise of judicial power or failure to act freely and fairly and where there is a reasonable suspicion or appearance or likelihood of bias in the mind of litigant or a party or improper use of power, then in that case, such a conduct or behaviour or an action on the part of a Judge would harm the independence of judiciary.

It appears that an impression was created in the mind of an officer, Commissioner of Police that the exercise of magisterial powers were not unbiased or free from prejudice resulting into filing of several revision petitions before the Sessions Court at Vadodara. Along with other aspects, this point alternatively when considered and if someone is prompted to take an action

so as to save the situation and a perception is taken that in the larger interest of public administration and public exigencies, order of transfer is necessitated, cannot be said to be a reflection of arbitrariness or tainted with bias or in any way punitive. The administrative side of the High Court was called upon to consider not only that aspect alone, but had to consider various other aspects including the fact that the officer concerned was already due for transfer and had continued beyond the normal period of three years upon the request and otherwise next transfer was round the corner. All these aspects must have weighed. Therefore, the allegation that the transfer order was biased or was influenced only because of the representation of the Commissioner of Police cannot be accepted.

The representation of the CP was placed on record along with other papers even in this appeal and we have examined the same. What is stated by him, inter alia, in his report or representation is to consider the question or propriety of transfer of investigation from one police station to other police station in a case where FIR has already been lodged and also to consider the validity of directing a particular authority not concerned with the particular police station. In view of the settled proposition of law and the latest case law, how could it be said that such a representation even if it is considered objectionable can be said to have caused bias or prejudice in passing the order of transfer ? Like any other litigant, a responsible officer like Commissioner of Police could bring to the notice of the High Court the grievance rightly or wrongly cherished by him and felt by him and that too in the light of the successive orders which one after the other became subject matters of revision petitions before the Sessions Court. Alternatively also it is in this context, what was said by the Police Commissioner has to be considered. There is no even allegation of malafide or personal grievance or bias against the Commissioner of Police. No doubt, we do not propose to justify the action in not attending the court in response to a notice of contempt. But at the same time, we cannot be oblivious to the fact that it (letter or notice dated 10.1.97) was challenged on the judicial side before the Sessions Court and stay against notice was obtained. However, it may also be noted that the Commissioner of Police, Vadodara, though initially impleaded as party in the main petition came to be deleted by the respondent-original-petitioner for the reasons not clear to us. Had he been a party, we would have also immediately considered other aspects. Since he is not a party, it would not be proper for us, at this

stage in this appeal, to make any observations adverse to the interest of the CP.

Notwithstanding that, it is an admitted fact that the CP has tendered unqualified apology before a Division Bench of this Court in a contempt proceedings initiated out of a public interest litigation being Misc. Civil Application No.249/97. It is also an admitted fact that the CP also tendered his unqualified apology before the Court of Chief Judicial Magistrate, at Vadodara, appearing in person on 13th February, 1997. Therefore, considering the relevant facts and circumstances, we are of the opinion that the aforesaid decisions relied on by the learned Sr. counsel Mr Mehta are of no avail to the respondent.

Reliance is also placed by Mr Mehta on the decision of the Apex Court in the case of Ishwarchand Jain vs. High Court of Punjab and Haryana, (1988) 3 SCC 370. After examining this decision and the facts and circumstances of the present case, we are of the opinion that the ratio propounded therein is not attracted to the present case. Therefore, Mr Mehta is not able to make any profit out of it.

Learned Sr. Counsel Mr Mehta also relied on a decision of the Supreme Court rendered in Ragistrar of High Court of Madras vs. R. Rajaiah, AIR 1988 SC 1388. It was a case of compulsory retirement. Our attention was drawn to the observations made in paras 20 and 21 of the said judgment. After having examined the facts and circumstances and the ratio of the said decision, we are of the opinion that it is inapplicable to the present case. In that case before the Supreme Court, it was found that the impugned order of compulsory retirement was not justified as there was no material to support it. It was, therefore, held to be arbitrary. It is inapplicable to the facts of this case.

The learned Addl. Advocate General has placed reliance on a decision of the Apex Court in Bank of Maharashtra v. Race Shipping and Transport Co. Pvt. Ltd, AIR 1995 SC 1368. The principles governing the grant of interim order exercising power under Article 226 are clearly laid down. It is held in the said decision that granting of interim relief or interim order which, practically, gives the principal relief sought in the petition for no better reason than that of, prima-facie, case has been made without being concerned about balance of convenience, public interest and host of other considerations must be deprecated. The ratio propounded in the said decision is

attracted to the facts of the present case.

Reliance is also placed on the decision of State of UP & ors. vs. Committee of Management of S.K.M. Inter College & anr. JT 1995(5) SC 196. It is held in this case that according to the settled proposition of law, the High Court exercising power under Article 226 of the Constitution is not like an appellate authority to consider the dispute. In the light of the facts and circumstances of the said case, it was observed that the High Court had traversed the controversy as a court of appeal and committed manifest error of law in interfering with the order. Therefore, the view which we have taken earlier is very much reinforced in saying that it is the decision making process and not the decision itself is subject to judicial review under Article 226.

In N.K.Singh vs. Union of India & ors. AIR 1995 SC 423, reliance is placed by the learned Addl. Advocate General and has contended that the learned single Judge has observed that when the transfer is avoidable, order would certainly be subject to judicial review. He has criticized this observation based on the ratio of the decision of the Supreme Court in the case of N.K.Singh (supra). He has taken us through the relevant paragraphs of the said decision. We have also dispassionately examined this decision.

It is not possible for us to agree with the observations made in the impugned order in para 14 in view of the clear proposition of law laid down in N.K.Singh's case (supra). Avoidability of the transfer was considered in view of the competence of the successor. This even if it is considered to be avoidable, the question of suitability of the successor has to be examined. So is not the factual scenario here nor there is any such allegation. Therefore, the reliance of the observation in para 9 of N.K.Singh's case (supra) in the impugned order under appeal appears to be not proper.

On the contrary , in the aforesaid case, it is clearly held that transfer of a Government servant in a transferable service is a necessary incident of the service career. Assessment of the quality of men is to be made by the superiors taking into account several factors including suitability of the person fora particular post and exigencies of administration. Several imponderables requiring formation of a subjective opinion in that sphere may be involved, at times. The only realistic approach is to leave it to the wisdom of the hierarchical superiors to make that decision. Unless

the decision is vitiated by malafides or infraction of any professed norm or principle governing the transfer, while alone can be scrutinised judicially there are no judicially manageable standards for scrutinising all transfers and the courts lack the necessary expertise for personnel management of all government departments. It was also observed therein that this must be left, in the public interest, to the departmental heads subject to the limited judicial scrutiny indicated therein. The private rights of the appellant being unaffected by the transfer, he would have been well advised to leave the matter to those in public life who felt aggrieved by his transfer to fight their own battle in the forum available to them.

The Apex Court in State of M.P. v. S.S.Kourav, 1995 AIR SCW 1065, held that transfer is an incident of service and the Courts cannot like an appellate forums to decide on transfers of officers on administrative grounds. It is also, clearly, held that court cannot enter into the expediency of posting of an officer at a particular place. It was further observed that the wheels of administration should be allowed to run smoothly and the Courts or tribunals are not expected to interdict the working of the administrative system by transferring the officer to proper places. It is for the administration to take appropriate decision and such decisions shall stand unless they are vitiated either by mala fides or by extraneous consideration without any factual background. It can, therefore, very well be visualised that the expediency of transfer decision or posting of an officer at a particular place cannot be examined in exercise of power under Article 226 of the Constitution of India. It directly applies to the facts of this case.

The principles pertaining to the powers under Article 235 of the Constitution of India are very well explained and extensively enunciated by the Apex Court in State of UP vs. Batuk Deo Pati Tripathi, (1978) 2 SCC 102. It has been held that all the matters relating to subordinate judiciary including the disciplinary proceedings are subject to complete control of the High Court on its administrative side. The administrative power vested in a body of persons came for effective exercise of such power to regulate the manner of doing it subject, however, to ensuring that the essence of the power is not thereby diluted. As we have observed hereinbefore, that the High Court acts and exercises its administrative jurisdiction through committees and its judicial jurisdiction through Benches. The view which we have taken is thus very much reinforced by the decision rendered in Batuk Deopati Tripathi's (supra) case.

In Prasanna Kumar Roy Karmarkar vs. State of W.B. & ors., (1996) 3 SCC 403, it has been held that when an interim order is passed by the learned single Judge of the High Court and when it is reversed it is the duty of the court to put the parties in the same position as they were prior to the date of passing of order on the celebrated mechanism and principle of "actus cureae neminem gravabit". Thus, it was held that the principle must be applied and the original position must be restored while reversing the order.

This Court in Gujarat Flurochemicals Ltd vs. Ranjitnagar Gram Panchayat, 1997(1) GCD 77 (Guj.) wherein one of us (J.N.Bhatt, J.) was party, has laid down principles on which exercise of equitable and discretionary powers rests. We have also indicated hereinbefore that the Court is obliged to consider while passing interlocutory order or interim decision analogous provisions and powers under Order 39 Rule 1 & 2. Thus, the discretionary and equitable orders are required to be passed considering the aforesaid celebrated principles.

Similarly, in State of Gujarat v. B.N.Leuva, 1995(2) GLR 1677, it has been held by the Apex Court that the order of transfer is an incident of service and ordinarily it should not be interfered with. The mere fact that the party had been posted only for 1-1/2 months, is not and could not have been a reason for coming to the conclusion that he could not be transferred from there and they will not be a ground warranting interference of the Court exercising power under Article 226. No doubt, there was an allegation of malafide in that case which was not proved, whereas, in the present case, there is not even remote suggestion or whisper of malafides and CJM has completed more than 3-1/2 years atBaroda and normally transfer is effected after 3 years.

In J.K.Kalal v. Gujarat Mineral Development Corporation, 1991(1) GLH 232, this court (Coram: J.N.Bhatt, J.) has also laid down material principles governing the grant of relief in case of a transfer. Interpreting the provisions of Article 226 it is held that transfer of an employee of a public Corporation is like any other Government employee who is holding a transferable post. A person who is holding a transferable post is liable to be transferred from one place to another on administrative ground and in public interest. When the transfer is challenged, the burden of establishing the allegation or basis of challenge of transfer is on the

person who propounds it. It is also clearly held that to make out a case for interference in matters of transfer, there should be substantial and strong material. What principles and aspects should be addressed to before passing interlocutory order or interim direction are, also, succinctly, laid down in Abhani Sureshkumar Parshottam vs. Gujarat Electricity Board, 1991(2) GLH 327.

It was contended on behalf of the appellant High Court by learned Addl. Advocate General Mr Shelat that interim order, which amounts to virtually allowing the writ petition for interim purpose should not be granted and in support of his contention, reliance is placed on a decision of the Apex Court in Engineer-in-Chief v. ASI Reddy, 1987 (Supp) SCC 139. It has been, clearly, held in the said decision that interim order which amounts to virtually allowing of writ petition for interim purposes should not be issued by High Court while dealing with service dispute. It squarely applied to the facts of case on hand.

In Mahanadi Coalfields Ltd v. Orient Paper & Industries Ltd. 1995 Supp (2) SCC 717, the Hon'ble Supreme Court has held that the purpose of an interlocutory order is to preserve in status quo the rights of the parties during the pendency of the litigation and therefore, while passing an interim order or interlocutory direction, the Court is also required to protect the interest of the other If the writ petition ultimately fails and if the dispensation ordered by the High Court prevails, the respondent before it, even in the event of its success, would be faced with a fait accompli and it would well be impossible for that respondent to gather the dues from the innumerable purchasers of coal. It was, therefore, held that interim orders passed by the High Court do not protect the interests adequately if the final result goes in his favour. Accordingly, the order was quashed and set aside.

In the course of submissions and hearing of this appeal, we have noticed some averments in para 3 in affidavit of the respondent dated 2nd March, 1997. The bracketed portion of the said para was sought to be deleted by learned Sr. Counsel Mr Mehta when it was brought to his notice. We, therefore, do not propose to deal with such objectionable observations at this stage.

After having considered the various divergent submissions raised by the learned Additional Advocate General and learned Sr.Counsel Mr Mehta and after giving our

dispassionate thoughts to the relevant facts required for the purpose of our decision, since the main Special Civil Application is pending and considering the proposition of law enunciated, hereinbefore, we are of the opinion that the impugned mandatory interlocutory order of the learned single Judge staying the transfer passed by the appellant High Court against the respondent-CJM and permitting to resume her is required to be quashed and set aside . We have not been able to persuade ourselves to agree and substantiate the impugned order challenged in the appeal.

With the result, we are left with no alternative but to quash and set aside the impugned order of the learned single Judge while allowing this appeal. Accordingly, impugned order is quashed and this appeal is allowed. Considering the facts and circumstances, there shall be no order as to costs. Since the main matter is pending before the learned single Judge, we clarify that the observations made by this Court on factual aspects are, obviously, and purely made at the interlocutory stage for the decision of the interim order only.

.....